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MICHAEL RODAK

In the

Supreme Court of the United States

OCTOBER TERM, 1972

AMERICAN CIVIL LIBERTIES UNION, et al.,
Petitioners,

vs.

MELVIN R. LAIRD, Secretary of Defense, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALEXANDER POLIKOFF
DAVID GOLDBERGER
HENRY MASON
JOEL J. SPRAYREGEN
THOMAS TODD
BERNARD WEISBERG

Attorneys for Petitioners
c/o American Civil Liberties Union
6 South Clark Street
Chicago, Illinois 60603

The Scheffer Press, Inc.—(312) 263-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

AMERICAN CIVIL LIBERTIES UNION, et al.,
Petitioners,

vs.

MELVIN R. LAIRD, Secretary of Defense, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on May 23, 1972, and the order of that court, dated July 12, 1972, denying a timely petition for rehearing.

OPINIONS BELOW

The opinions of the court of appeals (dated May 23, 1972 and July 12, 1972, respectively) are not yet reported. They, and the court's judgment order of May 23, 1972, appear in the appendix hereto. (App. A, B and C, *infra.*)

The opinion of the district court of January 5, 1971 is reported at 323 F.Supp. 1153 (N.D. Ill. 1971). It and the district court's order are also included in the appendix. (App. D and E, *infra.*)

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1972. A timely petition for rehearing was filed on June 6, 1972. The order denying rehearing was entered on July 12, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether petitioners have standing to complain of United States Army surveillance activities directed against them where direct injury from the activities complained of was alleged in the complaint and shown by evidence at a hearing on petitioners' motion for a preliminary injunction.

2. Whether the court of appeals correctly held that this Court's decision in *Tatum* v. *Laird,* ..... U.S. ..... (June 26, 1972) was dispositive of this case and justified dismissal of the complaint and the action.

STATEMENT OF THE CASE

Petitioners brought this class action in the United States District Court for the Northern District of Illinois, Eastern Division, for an injunction against surveillance activities directed against them by the United States Army on the ground that those activities were inflicting irreparable injury upon plaintiffs in violation of the First, Fourth, Fifth and Ninth Amendments to the United States Constitution. Named as defendants were the

Secretary of Defense, the Army Chief of Staff, the Army Assistant Chief of Staff for Intelligence, the Commanding General of the United States Army Intelligence Command, and the Commanding Officer of the 113th Military Intelligence Group of the United States Army. In addition to an injunction, plaintiffs sought a declaratory judgment that the conduct complained of violated the Constitution and an order requiring the destruction of data illegally obtained. The jurisdiction of the district court was invoked under 28 U.S.C. §1331.

The petitioners, all plaintiffs below, are the American Civil Liberties Union and Jay Miller, its Executive Director; Jesse Jackson, the Executive Director of Operation Breadbasket, an agency of the Southern Christian Leadership Conference; Aldermen A. A. Raynor and William Cousins of Chicago; Gordon Sherman, former Chairman of The Business Executives Move for Vietnam Peace, and Henry DeZutter, a Chicago journalist.

In brief, the complaint alleged that the United States Army was carrying on a nationwide domestic surveillance system which had a directly injurious effect upon the plaintiffs. The system was alleged to include surveillance respecting not only the public activities but also the private lives of both the named plaintiffs and other civilians. (Rec. 2-4, 5.)* The disruption of plaintiff organizations and the harassment of individual plaintiffs were also alleged.

With the complaint plaintiffs filed a motion for a preliminary injunction, a hearing on which was promptly

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* The pleadings volume of the record is cited by document number and page. Thus the above citation is to document number 2, pages 4 and 5.

scheduled and held. At the commencement of the hearing defendants filed a motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Defendants' motion was taken under advisement. At the conclusion of the preliminary injunction hearing, the injunction was denied and the complaint and the action were dismissed. (App. D, p. 11a.) On appeal the court of appeals affirmed and later denied a petition for rehearing because "a Supreme Court holding that the allegations of the *Tatum* complaint may not be tried is dispositive of this case as well." (App. A, *infra*, p. 3a.)*

REASONS FOR GRANTING THE WRIT

In *Ex parte Levitt*, 302 U.S. 633, 634 (1937), it was said that to entitle a private individual to invoke judicial power to determine the validity of executive action he must show that he has sustained, or is immediately in danger of sustaining, "direct injury" as a result of that action. This Court held that the plaintiffs in *Tatum* v. *Laird*, ... U.S. ..... (June 26, 1972) did not meet that test. (Slip opinion in *Tatum*, p. 12.)

The only allegations in the *Tatum* complaint which can be said to approach the requirement of an allegation of "direct injury" are in paragraphs 5 and 15. In paragraph 5 it was alleged that the *Tatum* plaintiffs sought the court's protection of their right to engage in lawful,

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* Thus the court of appeals did not reach the merits. It said:

> "[W]e assume, without deciding, that the domestic intelligence activities as conducted by the Army prior to June 7, 1970, were illegitimate, and that the excesses could be excised by judicial decree." (App. C, *infra*, p. 7a)

political activity "without fear of harassment, intimidation and injury resulting from" the Army's activities. (Rec. 15-4.) In paragraph 15 it was alleged that the purpose and effect of the Army's activities was "to harrass and intimidate" plaintiffs. (Rec. 15-6.)* In each instance harassment or intimidation was alleged to be a "result" or "effect" of the surveillance system. Thus, the essential allegation of the *Tatum* complaint was restated by this Court as follows:

> "[T]hat the exercise of . . . First Amendment rights is being chilled by the mere existence, *without more*, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose." (*Tatum* slip opinion, p. 9, emphasis supplied.)

Moreover, the Court observed that the *Tatum* plaintiffs had "cast considerable doubt" on whether, in fact, they suffered from any chill—i.e., were injured parties. (*Id.*, p. 12, n.7.) The Court referred to Judge MacKinnon's view that plaintiffs' admission that they were not cowed and chilled "constitutes a basic denial of practically their whole case." (*Id.*, p. 13, n.7.) The Court then concluded:

> "Even assuming a justiciable controversy, if respondents themselves are not chilled . . . [they] clearly lack that 'personal stake in the outcome of the controversy' essential to standing." (Id., p. 13, n.7.)

---

* Other allegations, such as that plaintiffs were "deterred" (¶ 16; Rec. 15-6), are more properly classified as the "subjective 'chill'" which the *Tatum* opinion says is not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm—i.e., the "direct injury" test. (*Tatum* slip opinion, pp. 12-13 and n.7.)

This case presents the claim of "direct injury" that was found to be lacking in *Tatum*. Thus,

1. The complaint here alleges directly (i.e., not as a result or effect of the mere existence of the surveillance system) the disruption of the plaintiff organizations. (¶7 of the complaint, Rec. 2-4.) There was no like allegation in *Tatum*.

2. The complaint here alleges directly (i.e., not as a result or effect of the mere existence of the surveillance system) the harassment of individual plaintiffs. (¶7 of the complaint, Rec. 2-4.) There was no like allegation in *Tatum*.

3. The complaint here alleges surveillance, data collection and record keeping respecting the "private associations" and "private lives" (¶10 of the complaint, Rec. 2-5) of the individual plaintiffs as well as of their public activities. The *Tatum* complaint was confined to the latter.

4. The complaint here alleges distribution of the data collected to private as well as governmental agencies. (¶11 of the complaint, Rec. 2-11.) The *Tatum* complaint alleged only a "plan" to make information available to government agencies. (Rec. 15-5.)

Under familiar rules these allegations must be taken as true and liberally construed, together with all appropriate inferences, in favor of plaintiffs. See, *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957); *Jenkins* v. *McKeithen*, 395 U.S. 411, 421 (1969); Wright & Miller, *Federal Practice and Procedure*, §1357, ns. 75-77 (1969). In *Tatum* the plaintiffs were not entitled to have their allegations so construed because of their admission that they were not in fact cowed or chilled by the activities of which they complained. Here, by contrast, there was no such ad-

mission. On the contrary, the evidence at the preliminary injunction hearing supported and strengthened the allegations of injury. Thus,

1. Jesse Jackson testified that the Army surveillance "has had an effect" upon his organization, Operation Breadbasket. (Tr. 486.)* He said that his organization's success, "its life, is directly related to the confidence that people have in us," that the Army surveillance gave people the impression that Operation Breadbasket was engaging in subversive activity, that it undermined the confidence people had in the organization, and that telephone calls had been received to that effect. (Tr. 486-87.)

2. Jackson also testified that the surveillance had had "a most profound effect upon my family," and related how his daughter and his wife were both "visibly shaken" as a result of disclosure that Army Intelligence was conducting surveillance of their father and husband. (Tr. 487.)

3. Gordon Sherman of The Business Executives Move for Vietnam Peace, and Jay Miller of the American Civil Liberties Union, both testified about reduction of organizational membership, staff demoralization, and direct impact on their organizations' effectiveness as a consequence of the Army surveillance. (Tr. 492, 498-99.)

4. A former Army intelligence agent testified to various forms of direct harassment and embarrassment of organizations and individuals by Army intelligence agents engaged in the domestic surveillance system, for example, by misleading telephone calls to leaders of anti-war organizations (Rec. 7-7), and by releasing intimate and private information to the news media to embarrass per-

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* The transcript of proceedings at the preliminary injunction hearing is cited "Tr." with the page number.

sons active in the anti-war movement. (Rec. 7-8.) (See, Tr. 208, 209-11, 212-13, 215-16, 360-61.)*

The significance of the foregoing is that this is not a case in which the allegations are limited to the "mere existence" of the Army's data gathering system and in which even those allegations are admitted away. Nor is it a case in which allegations of "chill" are based solely on a "perception of the [Army] system as inappropriate," or on "beliefs that [the Army's activity] is inherently dangerous" or on "apprehensiveness that the Army may at some future date misuse the information." (*Tatum*

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* This Court's *Tatum* opinion describes the Army's domestic surveillance system as consisting "essentially of the collection of information about public activities," and says that "the principle sources of information were the news media and publications in general circulation." Slip opinion, p. 5. The evidence in this case shows that the information collected included highly personal information, such as facts relating to sexual and financial matters. (Tr. 446-47.) Information was collected by the use of undercover agents as well as from public media sources. (Tr. 692-94, 771.) Moreover, testimony that most of the material in an intelligence file consisted of newspaper clippings (e.g., Tr. 535) fails to convey the full extent and nature of such material. A newspaper article was normally mounted and attached to an exhibit cover sheet which was in turn attached to an agent's report written about the article on an official agent report form. (Tr. 672-74.) The agent's report included a brief synopsis of the information in the article and identifying data on the individual mentioned, including the date and place of birth, social security number, and any previous involvement in civil disorder. (Tr. 675.) The agent's report also included any additional information not mentioned in the newspaper article that would assist the reader in understanding the article. (Tr. 677.) The sources for such additional information included files that contained, among other materials, extracts from reports of military intelligence undercover operations. (Tr. 657, 678.)

slip opinion, p. 12.) Rather the allegations are that the plaintiff organizations were disrupted and that the individual plaintiffs are harassed and embarrassed, and the evidence supports those allegations: telephone calls to organizations from disturbed members, poignant but tangible impact on a father's relationship to his daughter, actual dissemination by government officials to civilians of intimate and private information obtained covertly, and the like.*

If the allegations of the complaint are construed, as they must be, liberally and favorably to the plaintiffs, the "direct injury" test of *Levitt* is met and a justiciable controversy is presented.

CONCLUSION

Based on the test set out in this Court's *Tatum* opinion, a writ of certiorari should issue to review the judgments and opinions of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ALEXANDER POLIKOFF
DAVID GOLDBERGER
HENRY MASON
JOEL J. SPRAYREGEN
THOMAS TODD
BERNARD WEISBERG
Attorneys for Petitioners

October 10, 1972

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* There was, of course, no hearing on the merits below but only a hearing on a preliminary injunction, held without benefit of discovery. No inference may be drawn that the evidence offered on the merits would be limited to that which plaintiffs were able to assemble for a prompt preliminary injunction hearing.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
July 12, 1972

Before
Hon. JOHN S. HASTINGS, *Senior Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiffs-Appellants,
vs.
MELVIN R. LAIRD, et al.,
Defendants-Appellees.

No. 71-1159

On Petition For Rehearing.

ORDER

On June 6, 1972, plaintiffs-appellants filed a timely Petition for Rehearing to Modify Opinion to Stay Rather Than Dismiss Proceedings, in which they persuasively suggested that the principle of comity, which underlay our decision, made it appropriate to defer final action in this litigation until after the Supreme Court rendered its opinion in *Laird* v. *Tatum*. Petitioners suggested that a reversal of the Court of Appeals for the District of Columbia would not necessarily be dispositive of this litigation. Recognizing possible merit in this suggestion, we withheld action on the petition pending the Supreme Court decision which was announced on June 26, 1972. 40 U.S.L.W. 4850.

Petitioners advance four points of distinction between this case and *Tatum*: (1) the *Tatum* plaintiffs were not actually "aggrieved," whereas these plaintiffs alleged and testified that they had been harmed; (2) *Tatum* involved only the collection of public information, whereas this case involves surveillance of private conduct as well; (3) whereas *Tatum* merely involved a plan to disseminate information outside the military, this case involves proof of such dissemination; and (4) this case primarily involves this region, whereas *Tatum* involved the entire country.

The rationale of the opinion of the Supreme Court is fairly applicable to regional as well as national activities; moreover, the opinion contains several references to the exchange of information between military and non-military sources. The third and fourth points must therefore be rejected. The other two points are not, however, explicitly covered by the opinion of the majority. We are nevertheless persuaded that they were implicitly rejected by the Court.

Basically, the harm to the plaintiffs-appellants about which they testified was the fact that some of them had been the targets of military surveillance. The dissenting opinions in *Tatum* indicate that similar harm was disclosed by that record.[1] Necessarily, therefore, the Court held that such harm was not actionable.

How much "private" information about the *Tatum* plaintiffs had been collected is by no means clear. Mr.

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[1] Mr. Justice Douglas states: "Respondents were targets of the Army's surveillance." 40 U.S.L.W. at 4857. Mr. Justice Brennan quotes the following from Judge Wilkey's opinion:

> "The record shows that most if not all of the [respondents] and/or the organizations of which they are members have been the subject of Army surveillance reports and their names have appeared in the Army's records." 40 U.S.L.W. at 4861

Justice Douglas stated that "the Army's surveillance was not collecting material in public records but staking-out teams of agents, infiltrating undercover agents, creating command posts inside meetings, posing as press photographers and newsmen, posing as TV newsmen, posing as students, shadowing public figures." 40 U.S.L.W. at 4857. We have again reviewed the record in the case before us. Although there is evidence of "covert" activity that should not be condoned, we are persuaded that neither that evidence nor the allegations in the complaint set forth a valid basis for distinguishing *Tatum*. Accordingly, we adhere to our original opinion that a Supreme Court holding that the allegations of the *Tatum* complaint may not be tried is dispositive of this case as well.

The petition for rehearing is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
May 23, 1972

Before

HON. JOHN S. HASTINGS, *Senior Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

AMERICAN CIVIL LIBERTIES UNION, a non-profit corporation, et al.,
Plaintiffs-Appellants,

No. 71-1159 vs.

MELVIN R. LAIRD, etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1971 — JANUARY SESSION, 1972

No. 71-1159

AMERICAN CIVIL LIBERTIES UNION, a non-profit corporation, JAY MILLER, JESSE JACKSON, A. A. RAYNOR, GORDON SHERMAN, HENRY DE ZUTTER and WILLIAM COUSINS,

Plaintiffs-Appellants,

v.

MELVIN R. LAIRD, Secretary of Defense, GENERAL WILLIAM C. WESTMORELAND, Chief of Staff, U. S. Army, GENERAL JOSEPH A. McCHRISTIAN, Assistant Chief of Staff for Intelligence, U. S. Army, GENERAL WILLIAM H. BLAKEFIELD, Commanding General, U. S. Army, Intelligence Command, and COLONEL JOSEPH WALKER, Commanding Officer, 113th Military Intelligence Group, U. S. Army,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 70 C 3191

RICHARD B. AUSTIN, *Judge.*

ARGUED JANUARY 26, 1972 — DECIDED MAY 23, 1972

Before HASTINGS, *Senior Circuit Judge,* STEVENS and SPRECHER, *Circuit Judges.*

STEVENS, *Circuit Judge.* In this class action plaintiffs claim that the United States Army collects and retains more information about civilians than it needs. They pray for an injunction against the Army's massive domestic intelligence operation because it discourages the free expression of ideas.

Plaintiffs are members of the class represented by Arlo Tatum and other named plaintiffs in litigation commenced in the United States District Court for the District of Columbia on February 17, 1970, in which the same claims are asserted. After that case was filed and the public became aware of the scope of the Army's domestic intelligence activities, hearings were held by a committee of the United States Senate in which the Army was severely criticized. On or about June 7, 1970, the Army discontinued most of the unnecessary speech inhibiting intelligence activities of which plaintiffs complain.

On April 29, 1970, the District Court for the District of Columbia dismissed the *Tatum* complaint on the ground that it raised issues which were not justiciable. On May 4, 1970, notices of appeal were filed, and on April 27, 1971, the Court of Appeals for the District of Columbia rendered scholarly opinions, *Tatum* v. *Laird,* 444 F.2d 947, exhaustively discussing the legal issues, reversed the district court order and remanded the case for trial. Subsequently, the Supreme Court granted certiorari, heard oral argument, and now has the *Tatum* case under advisement.

The case before us was filed on December 21, 1970. Immediately thereafter plaintiffs moved for a preliminary injunction and defendants filed a motion to dismiss the complant. In response to defendants' motion to dismiss, plaintiffs' counsel repeatedly urged the court to listen to the evidence to be offered in support of the application for a preliminary injunction and to evaluate the sufficiency

of the pleading in the light of that evidence. Accordingly, the trial judge heard evidence for four days, found that the Army had indeed engaged in some unnecessary — in fact some stupid and wasteful — intelligence activities, but found no significant threat to First Amendment freedoms, and therefore denied injunctive relief and dismissed the complaint.

We are satisfied that the complaint was properly dismissed. Since the Supreme Court opinion in *Tatum* will no doubt render our discussion of the law obsolete, we shall only briefly identify the reasons for our conclusion which, we are convinced, will be the same whether *Tatum* is affirmed or reversed.

First, we assume, without deciding, that a "massive" domestic intelligence operation conducted by the United States Army can have a sufficient deterrent effect on the free expression of political ideas to give individual citizens affected thereby standing to challenge the legitimacy of such an operation.

Second, we assume, without deciding, that the domestic intelligence activities as conducted by the Army prior to June 7, 1970, were illegitimate, and that the excesses could be excised by judicial decree.

Third, the evidence in the record, as appraised both by the district court and by this court, establishes that the Army's intelligence activities subsequent to June 7, 1970 — or more specifically on December 21, 1970, when the complaint was filed — were not of the massive, overly broad character described in the complaint and in counsel's argument. Thus, the claimed intrusion on First Amendment rights was clearly less significant at the time this complaint was filed than it was at the time the *Tatum* complaint was filed.

Fourth, to the extent plaintiffs' claims are justiciable, they can be most effectively asserted in the *Tatum* litiga-

tion. Both this complaint and the *Tatum* complaint[1] are class actions; except for different named class representatives and other differences of no significant import, the allegations of the two complaints and the prayers for relief are identical — in most instances the complaint in this case reproduces verbatim the language of the *Tatum* complaint; a reading of the complaint leads one to the inescapable conclusion that the two classes are identical; the evidence adduced at the hearing on the preliminary injunction indicates, even if the parallel complaints did not, that there is cooperation between the *Tatum* plaintiffs and the plaintiffs in this case and that the same witnesses would give important testimony in both proceedings. If there is some difference in the allegations of the two complaints which we have overlooked, it would be a simple matter to amend the *Tatum* complaint if the Supreme Court affirms the remand of that case for trial.

If the Supreme Court holds that the allegations in the *Tatum* complaint may not be tried, that ruling will certainly dispose of this case as well. If, however, that Court affirms the Court of Appeals for the District of Columbia and *Tatum* is remanded for trial, no purpose will be served by conducting a duplicate trial in this Circuit.

We conclude that if the issues presented by this complaint are to be tried, the principle of comity dictates that they be tried in the District Court for the District of Columbia. Though rejecting its application on the facts of the case before him, Judge Hastings has concisely stated the relevant principle:

> "Briefly, the comity doctrine is one based on notions of sound judicial administration and requires that when two identical actions are filed in courts of concurrent jurisdiction, the one which first acquired jurisdiction should be the one to try the lawsuit. The purposes of the rule are to avoid unnecessarily bur-

[1] That complaint is in the record as an attachment to the defendants' motion to dismiss.

dening courts and to avoid possible embarrassment from conflicting results." *Great Northern Railway Co.* v. *National Railroad Adjustment Board,* 422 F.2d 1187, 1193 (7th Cir. 1970).[2]

Plaintiffs seek declaratory and injunctive relief; it is therefore especially appropriate that the principles of comity be applied. Mr. Justice Frankfurter has written:

> "The Federal Declaratory Judgments Act, facilitating as it does the initiation of litigation by different parties to many-sided transactions, has created complicated problems for coordinate courts. Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration are here equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts. . . ." *Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.,* 342 U.S. 180, 183-184.

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[2] The doctrine of comity is not new, of course. See *Covell* v. *Heyman,* 111 U.S. 176, 182:

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord. . . ."

See also *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 229; *Milwaukee Gas Specialty Co.* v. *Mercoid Corp.,* 104 F.2d 589, 592, (7th Cir. 1939). Later cases include *Hilton Hotels Corp.* v. *Weaver,* 325 F.2d 1010 (D.C. Cir. 1963), *cert. denied.* 376 U.S. 951; *Mattel, Inc.* v. *Louis Marx & Co.,* 353 F.2d 421, 423-424, *cert. dismissed,* 384 U.S. 948; *Mann Manufacturing, Inc.* v. *Hortex, Inc.,* 439 F.2d 403, 408 and n. 6 (5th Cir. 1971). As the cited cases indicate, the problem most often arises in patent litigation; application of the doctrine may or may not result in deferral to the jurisdiction of first filing, depending on the facts of the case.

Here, the issues were first raised in the District of Columbia litigation. As to the two cases, as we have noted, the class is the same; the allegations are the same; the prayers for relief are the same. If the requested relief is granted in the *Tatum* litigation, there is no additional relief that plaintiffs could obtain in this court. If injunctive relief is required, it is best administered by one court; that court should be the one in which the relief was first sought.

In view of the serious character of the charges in the complaint and the representations made in support of the application for a preliminary injunction, we believe the Chancellor properly exercised his discretion in conducting an evidentiary hearing notwithstanding the fact that an analogous class action had been dismissed by the District Court for the District of Columbia. Since there had been no formal determination of the class in that proceeding, these plaintiffs were not barred from commencing this litigation. On the other had, equitable considerations also support a decision to abstain from permitting a second class action involving the same issues to proceed if the *Tatum* complaint is ultimately upheld. Quite obviously the judiciary should proceed with the utmost restraint in litigation seeking to enjoin activities carried on by the Army. Even assuming an overriding public interest in the prosecution of one such case, there is no pressing need for a second.

Wise judicial administration requires that we defer to the jurisdiction of the District of Columbia district court. Accordingly, we affirm the order denying the motion for preliminary injunction and hold that the complaint was properly dismissed. That determination, of course, is made without prejudice to whatever rights plaintiffs or other members of the class which they represent may have.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT

Northern District of Illinois Eastern Division

Name of Presiding Judge, Honorable Richard B. Austin

Cause No. 70 C 3191 Date Jan. 5, 1971

Title of Cause

American Civil Liberties v. Westmoreland

Pltffs' further rebuttal hd—Pltffs rest—Parties rest—argts hd—Fndg for defts and against pltffs—Each and all of pltffs' prayers for relief are denied and complt and action are dismd.

/s/ Austin, J.

APPENDIX B

Opinion of the District Court,
Rendered January 5, 1971.

The Court: There has been a cliche, or an accepted statement from the past that a certain profession is known as the world's oldest profession. I question that. I think the world's oldest profession is spying, and it started in the Garden of Eden when somebody was looking and saw Eve eat the apple. And then Cain started spying on Abel.

Spying goes back to antiquity, and according to the Old Testament, all the way back to the Garden of Eden.

I think what has been conceded as the world's oldest profession must at least yield first place to spying, and, of course, it has been carried down from that time at the beginning to the present time. It has had its advocates, Judas, Mark Anthony, Nathan Hale, and I suspect that maybe Mr. O'Brien, in going around the country, saw so many statues of Nathan Hale that he might have thought, "Maybe there will be one some day for John M. O'Brien as a superspy of all time—Mata Hari, Edith Cavell, Richard Philbrick, counterspy, the neighborhood curtain peekers that are watching as their neighbors go by to see what kind of shape they are in or who they are taking home with them that day. They exist on your block and they exist on my block and have for many years and will continue to exist.

Of course, there was a possibility that maybe if somebody drops out of Mission Impossible it might leave an opening for a new actor, a new good-looking actor.

There is no question that the administration has a right to use all the facilities available to the administration to try and fulfill the oath that was taken to protect

and defend the Constitution and to preserve the Constitution from all enemies foreign and domestic, and I, at this time, strive as I have endeavored to, have great difficulty in determining that there has been any violation of anybody's constitutional rights.

The Fourth, Fifth and Ninth have been abandoned. We are now down to the First Amendment, the chilling effect of this activity on someone's freedom of speech.

If there has been anything disclosed by what we have heard here for the past week, if we must rely on Army Intelligence that there will be no seven days in May in this country, a man on a white horse will never arrive.

This evidence indicates that typical, gigantic Washington bureaucratic boondoggle. Military intelligence is the Army's WPA, its leaf-rakers, its shovel-leaners, and paper-shufflers. It has revealed that there are too many Colonel Throttlebottoms, Major Ashtire—

That is A-s-h-, Mr. Court Reporter,—regional Special Operations Officer Fumbles and uncontrollable special agents Bumbles seducing unwitting bartenders to assist in this threatening, menacing assemblage of Keystone Cops.

The chief beneficiary of military intelligence has been newspaper circulation.

The chief menace has been the increase in air pollution from burning newspapers from which has been extracted, for dossiers, valuable secretive bits of common knowledge available to all who can read.

I think unquestionably the first appointment of all ancient Pharaohs was a papyrus clipper, and that has gone down from that day to this through all of the bureaucratic assemblages on the local, state and national level.

I hope that those who have testified and swore that they were chilled by the Army surveillance have been warmed by the revelations in this hearing. I am still con-

fused and bemused and puzzled as to why one of the witnesses, Mr. Miller, who admitted reading the same clippings in his file in the sanctity of his office, why doing this there had no effect on his thermometer. I think perhaps he read and re-read them because they tended to warm the cockles of his heart.

This clipping business is a national pastime of all of those who have some desire to see themselves in print.

I find that while there is no violation proved by a preponderance of the evidence of the violation of any constitutional rights, there has been a tremendous waste of taxpayers' money in hiring people to perform the duties that were performed as revealed by the evidence in this case, and this is not limited merely to one branch of the federal government, it is limited, based on my experience, to all branches of the federal government, all of whom have papyrus paper clippers to preserve for posterity and their grandchildren their importance while they occupied the federal scene.

There has been much made of the fact that last June there was a great burning in Washington or here, which also tended to pollute the air, but I don't think that it was because anybody thought that anyone's constitutional rights were violated. Perhaps there were some running for public office last fall that thought that this might affect their chances of their candidacy, or maybe they wished to conceal this boondoggle that I have heretofore referred to.

The Court denies the request for a declaratory judgment.

The Court finds that the Army, for whatever reason, has sought to eliminate from their files this mountain of paper, I feel unable to restrain any agency whose job it is to preserve and protect the Constitution to limit their activities. Only the thin-skinned, and I have had no thin-skinned witnesses testify before me in this case,

could have any chill as a result of the evidence that has been disclosed in this courtroom.

Foot surveillance—I don't know whether that is done in three-quarter time or how it is done, but it is ridiculous, but it is a term that tends to glamorize a spy who has been looking at too many statues, statues of Nathan Hale.

The request for a preliminary and a permanent injunction to limit that surveillance is denied.

The request to destroy the remnants of whatever files still remain is denied.

I think Shakespeare, at the time that he wrote some of his yarns may have contemplated that this might come up and named two of them in regard to the evidence that has been disclosed here, one was "A Comedy of Errors" and the other was "Much Ado About Nothing."

That is the findings of the Court, that is the decision of the Court.

We will stand adjourned, Mr. Marshal.

Mr. Polikoff: Your Honor, one question: Is it the order of the Court that the complaint is dismissed? There is a pending motion to dismiss the complaint.

The Court: There is a finding against what you request, and for that reason the complaint is dismissed. You now have an appealable order.

Mr. Polikoff: That is the complaint and the action?

The Court: Yes.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-580

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
PETITIONERS

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On December 12, 1970, petitioners brought this class action in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment and an injunction against alleged military surveillance of their activities and the keeping of records relating thereto.

After a hearing in which numerous witnesses testified concerning the Army's activities in gathering

intelligence relating to possible civil disturbances, the district court on January 5, 1971, denied the relief sought and dismissed the complaint (Pet. App. 11a-15a). The court of appeals affirmed in an opinion filed May 23, 1972 (Pet. App. 5a-10a). Following this Court's decision in *Laird* v. *Tatum*, 408 U.S. 1, the court of appeals on July 12, 1972, denied a petition for rehearing (Pet. App. 1a-3a).

1. Petitioners contend that the Army's information-gathering activities inhibited recruitment efforts of petitioner organizations, deterred attendance at organization meetings, and harassed individual petitioners, all in violation of First Amendment rights of free speech and assembly. Last term, this Court held in *Laird* v. *Tatum*, 408 U.S. 1, that a similar claim did not constitute a justiciable case or controversy. The court below held, in an opinion rendered before this Court had decided *Tatum*, that the substantial identity of issues, parties, and evidence as between that case and the present case, made it desirable that petitioners' claims be asserted in the then-pending *Tatum* action, and that this Court's ruling in *Tatum* would be dispositive of the instant litigation.

In denying the petition for rehearing subsequent to the decision in *Tatum*, the court of appeals correctly found the distinctions advanced by petitioners were insubstantial, and that *Tatum* is dispositive of the instant case. The three distinctions urged here and below are: first, that the *Tatum* plaintiffs were not actually "aggrieved," whereas in this case it was alleged that the organizational petitioners were dis-

rupted and the individual petitioners harassed; second, that *Tatum* involved only the collection of public information, while this action involved the collection of "private" information as well; and third, that information collected by the Army in this case was actually distributed to both governmental and non-governmental sources. (A final distinction urged below was that this case involves only a region, whereas *Tatum* involved the entire country.)

In holding that these distinctions were not significant, the court below stated:

> The rationale of the [*Tatum*] opinion of the Supreme Court is fairly applicable to regional as well as national activities; moreover, the opinion contains several references to the exchange of information between military and non-military sources. The third and fourth points must therefore be rejected. The other two points are not, however, explicitly covered by the opinion of the majority. We are nevertheless persuaded that they were implicitly rejected by the Court.
>
> Basically, the harm to the plaintiffs-appellants * * * was the fact that some of them had been the targets of military surveillance. The dissenting opinions in *Tatum* indicate that similar harm was disclosed by that record. Necessarily, therefore, the Court held that such harm was not actionable. [Footnote omitted.] (Pet. App. 2a.)

This analysis is sound and, as the court below held on rehearing, the present action is governed by this Court's decision in *Tatum*.

2. Furthermore, the equitable relief sought by petitioners was properly denied. Before mid-1970, the principal mission of the 113th Military Intelligence Group was the collection of information which might be needed in connection with military efforts to quell civil disorders (Tr. 139).[1] Files were maintained on "organizations or individuals who had a high potential for creating or initiating civil disturbance" (Tr. 141), or whose assistance would be especially valuable in the event of such a disturbance to help "put a damper on any violence" (Tr. 538).

Such files fell far short of containing the dragnet of personal and private information which allegedly was being collected by the Army (Complaint, pars. 7, 10, 12; Pet. 6; Tr. 204). For example, the file maintained on petitioner Jay Miller consisted only of news clippings, and no longer exists (Tr. 531-532). A file maintained on Jesse Jackson as a person to be contacted to discourage violence consisted only of news articles and information from nonmilitary governmental sources (Tr. 250, 316, 538). This file was destroyed in 1970 (Tr. 539). The A. A. Raynor file used only information obtained from newspapers and the like (Tr. 321, 441). Harry De Zutter's file, composed solely of news articles written by him, was destroyed in June 1970 (Tr. 200, 534-535). The

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[1] "Whenever there is an insurrection in any state against its government, the President may, upon the request of its legislature or of its governor * * * use such of the armed forces, as he considers necessary to suppress the insurrection." 10 U.S.C. 331.

files on petitioner American Civil Liberties Union and its executive director, Jay Miller, have also been destroyed.[2]

The process by which the information comprising such files was collected was the subject of detailed testimony in the district court. Principally, the data were collected from newspapers and other publications, and from reports received from civilian government agencies and from state and local police (Tr. 156, 531-547).[3] No so-called "covert" surveillance of civilians was conducted (Tr. 144, 156). The information collected by the Army was furnished only to the military, to local and state police departments, and to certain investigative government agencies (Tr. 179).

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[2] A brief characterization of the ACLU is still contained in an encyclopedic listing of various organizations, including the Knights of Columbus, Masonic Order, B'nai B'rith, and others (Tr. 542-543). Files on petitioners Sherman and Cousins are being maintained (Tr. 540) because of their association with Veterans for Peace, an organization whose activities, according to the testimony below, are directed against the Army (Tr. 344-345, 535-536), and are therefore still of concern to it.

[3] Even the petitioners' chief witness, John Michael O'Brien, had no personal knowledge of any intelligence-gathering activities beyond clipping newspaper articles, observing public events, and asking other persons questions about the subject on whom a file was maintained (Tr. 183-194), except for one or two isolated, unauthorized incidents (*e.g.*, Tr. 209-211, 216-217). O'Brien testified that he never personally obtained any intimate, private information concerning any individual (Tr. 204).

After the complaint in the *Tatum* case had been dismissed but before the present action was brought, an Army directive in June 1970 took the 113th Military Intelligence Group "out of the civil disturbance business" (Tr. 133). It ordered the destruction of the bulk of files formerly maintained, except for "a few" which were deemed "of legitimate concern to the Army" (Tr. 136-137). Pursuant to that directive, the 113th has engaged in no civil disturbance activities since June 9, 1970, and virtually all of the files herein complained of have been destroyed. Petitioners instituted this suit in December 1970, and after a hearing the district court denied declaratory and injunctive relief, noting that the Army had already discontinued the practices in question and was purging its files. Since the results petitioners sought in this litigation had been substantially achieved, the denial of equitable relief was within the district court's discretion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

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No. 72-580

In the

Supreme Court of the United States

OCTOBER TERM, 1972

AMERICAN CIVIL LIBERTIES UNION, et al.,
Petitioners,

vs.

MELVIN R. LAIRD, Secretary of Defense, et al.,
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ALEXANDER POLIKOFF
DAVID GOLDBERGER
HENRY MASON
JOEL J. SPRAYREGEN
THOMAS TODD
BERNARD WEISBERG

Attorneys for Petitioners
c/o American Civil Liberties Union
6 South Clark Street
Chicago, Illinois 60603

The Scheffer Press, Inc.—(312) 263-6850

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PETITIONERS' REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents' memorandum in opposition to the petition for a writ of certiorari is in two parts.

The first part (pages 2-3), in arguing that the complaint failed to state a claim, virtually ignores the specific distinctions between this case and *Tatum* v. *Laird* that were set out at page 6 of the petition. Accordingly, we will not comment further upon it.

The second part (pages 4-6) asserts that "furthermore", the equitable relief sought by petitioners was properly denied for various factual reasons. This second

part is addressed to the denial of a preliminary injunction by the district court. It thus dwells on a matter irrelevant to the determination of whether the complaint states a cause of action that requires an answer to be filed. Moreover, this portion of the memorandum makes factual assertions that are unsupported and contradicted by the record.

Thus, it is asserted that, "Files were maintained on 'organizations or individuals who had high potential for creating or initiating civil disturbance' (Tr. 141) or whose assistance would be especially valuable in the event of such a disturbance to help 'put a damper on any violence' (Tr. 538)." (Br. 4.) In fact, the record shows that files were routinely maintained on organizations and individuals who were not shown to have such a potential. The Army's principal witness testified at the hearing on the preliminary injunction that if a "perfectly legitimate and peaceful organization like the American Friends Service Committee" co-sponsored a demonstration or other activity with another organization which had engaged in violence and "related activities", a file would be maintained on the American Friends Service Committee. (Tr. 847-48.) This same witness also testified that if an organization made a public statement in defense of a person who had engaged in violent activities or provided legal counsel, a file was established on such organization. (Tr. 758.)

It is also asserted that the files "fell far short of containing the dragnet of personal and private information which allegedly was being collected by the Army." (Br. 4.) In fact, the record shows the files contained precisely

such personal and private information, including facts relating to sexual and financial matters. (Tr. 446-47.)

Again, it is asserted that files consisted only of newspaper clippings. (Br. 4.) In fact, such "clippings" included additional information, some of which came from reports of military intelligence undercover operations. (See petition for writ of certiorari, p. 8.)

It is asserted that, "No so-called 'covert' surveillance of civilians was conducted. (Tr. 144, 156.)" (Br. 5.) In fact, the record shows that such surveillance was routinely conducted. The Army's principal witness stated that undercover agents were utilized who were assigned to other branches of the military service (Tr. 648-49), that the agents used "cover" names (Tr. 694), and that the witness himself engaged in undercover operations, perhaps once per week. (Tr. 171.)

Other assertions in the memorandum are similarly either inaccurate or incomplete statements of what the evidence shows. (*E.g.*, compare the assertion concerning the reason for maintaining a file on petitioner Jesse Jackson, Br. 4, with the statement of the Government's own witness, Tr. 742-43.)

In short, in attempting to minimize the importance of the pending petition for certiorari, the Government's memorandum seriously misreads the record before this Court.

Finally, the assertion by the Government that the activities complained of are no longer carried on is contradicted by evidence in the record (cf., Tr. 536, 540), and is

a question which should properly be for the consideration of the district court on remand after trial.

Respectfully submitted,

ALEXANDER POLIKOFF
DAVID GOLDBERGER
HENRY MASON
JOEL J. SPRAYREGEN
THOMAS TODD
BERNARD WEISBERG
Attorneys for Petitioners